The Continued Evolution of the NVCA Documents: A Detailed Summary of Changes

A redline of all the modifications to the NVCA documents shows the full text of the changes that have been made since the prior versions of the documents were posted by the NVCA. The table below summarizes in more detail the changes that have been made to the documents in this new release.[1] In an effort to provide a framework for understanding the overall impact of these changes, each change described below has been grouped into one of four categories based on the primary purpose of the change: 1. changes made to clarify the documents and/or eliminate opportunities for avoidance of the underlying intent; 2. changes that reflect shifts in venture capital practice; 3. changes that reflect efforts to generally refine and improve the documents; and 4. for the first time since the creation of the original form documents, provisions specific to life sciences transactions. The category into which changes have been placed is indicated in parentheses following the description of such change using the following annotations:

"AA"= Anti-Avoidance/Clarifying

"CP"= Changes in Practice

"GI" = General Improvements

"LS" = Life Science Transactions

Practitioners might disagree as to how the various changes highlighted below should be characterized. As the table reflects, certain changes may fit into more than one category. We have indicated in certain places in the table where the decision we made seemed particularly susceptible to two different characterizations. Not surprisingly, how a change should be characterized is subject to interpretation and depends in part on whether the provision is viewed from the perspective of the investor or the company.

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[1] Updated documents can be found at the NVCA's website at https://nvca.org/resources/model-legal-documents/. These documents were compared to the forms previously posted at the same website. The Model Form Stock Purchase Agreement and Model Form Voting Agreement were last updated in March, 2014. The Model Form Certificate of Incorporation, Model Form Investor Rights Agreement and Model Form Right of First Refusal and Co-Sale Agreement were last updated in August, 2013. This article continues the format used in "The Further Evolution of the NVCA Documents: A Brief Description of the Changes to the Crowdsourced Gem of Venture Capital Practice" http://www.mbbp.com/news/evolution-of-nvca-documents, which traced major changes made to these previously posted model documents since the original forms were posted by the NVCA in 2003. The substance of this article reflects the views of the authors only, and not those of the NVCA or Morse, Barnes-Brown & Pendleton, P.C.

The summary is selective. The NVCA model form drafting committee made many more changes than are covered below. Itemizing and characterizing all changes was beyond the scope of this exercise.

A disproportionate number of the changes that have been made may best be described as "general improvements". These changes reflect refinements in the documents based on venture capital practitioners' evolving understanding of the terms and conditions in practice, coupled with upgrades to reflect legal developments. Many of these general improvements are in the form of additional drafting options such as the provisions that would implement the Delaware Rapid Arbitration Act.

TABLE

MODEL FORM STOCK PURCHASE AGREEMENT

Provision	Description of Change	Type
1.3—Sale of Additional Shares of Preferred Stock	Many life science transactions will have staged investment commitments whereby the investors agree to invest a certain amount in the aggregate, with part of the committed capital invested at the time of the initial closing and subsequent investment obligations contingent upon the company achieving certain scientific, regulatory or commercial milestones. Section 1.3 takes on increased significance in such transactions. New footnotes 10-12 of the Model Form SPA provide commentary and drafting options that describe some of the special considerations. In addition to the modifications contemplated by footnotes 10-12, in a milestone based transaction Section 1.3 will typically include rules to determine when and whether a "milestone" has been achieved. These rules tend to be highly customized and as a result no specific drafting option has been proposed in the new Model Form SPA. A range of rules are available to choose from including, for example: (i) a determination by the company's BOD including preferred directors, (ii) a determination by a scientific advisory board comprised of appointed experts representative of the different stakeholders, and (iii) the determination being at the sole discretion of one or more of the lead investors. When the milestones are technical in nature and data is required to assess the achievement of the milestone, investors with a role in assessing the achievement of the milestone, or interested in the determination reached by a third party, should negotiate for access to the relevant supporting data.	LS
1.3(b)—Sale of Additional Shares (see footnote 10)	Life science transactions frequently have punitive mandatory conversion mechanisms that convert preferred stock held by investors that fail to meet their commitment to provide follow on financing in a milestone closing. This conversion can either be on a 1:1 basis, but is more typically on a more punitive reverse split ratio basis such as 10:1 where each share of preferred stock converts into 1/10 of a share of common stock. There is a corresponding mandatory conversion mechanism in the new Model Form Certificate of Incorporation.	LS

	When there is a reverse split penalty, investors that anticipate breaching their commitment would be economically incentivized to voluntarily convert their preferred stock 1:1 into common stock prior to the milestone closing in order to avoid the punitive reverse split. In order to eliminate this ability to avoid the penalty, there is often an accompanying covenant included that prohibits this type of voluntary conversion. Note that while the automatic conversion penalty similar to that described in the footnote is the most common mechanism for penalizing investors that fail to invest, a similar result can be achieved through a simple repurchase right at nominal consideration. While not included in the new Model Form SPA, this mechanism is sometimes used in the alternative.	
1.3(b)—Sale of Additional Shares (see footnote 11) (see footnote 12)	A provision can be added that either requires, or enables, certain investors to provide the company with the funds needed to fill out the milestone closing when one or more investors has breached the obligation to invest in a milestone closing. This is typically implemented through an undersubscription rights provision that either allows, or requires, the non-breaching investors to take up their pro rata share of whatever remains undersubscribed in order to allow the company to raise the funds anticipated in the milestone closing. The undersubscription rights provision in footnote 12 is permissive, not mandatory. While not included in the new Model Form SPA, even if the company has not achieved the milestones that would trigger the obligation to invest in a future milestone closing, the milestone closing provision will sometimes include an override mechanism whereby certain of the lead investors can decide that the investors as a group will fulfill their funding commitments, and possibly more, notwithstanding the failure to achieve the milestone.	LS
1.4 – Use of Proceeds (see footnote 13)	Life science transactions frequently have a use of proceeds provision that more carefully circumscribes how the proceeds may be used, limiting use of proceeds, for example, to R&D associated with a specific therapeutic.	LS
Section 1.5 –	The definition of "Company Covered Person" has been	GI/CP

Definitions	removed in light of the fact that the Purchaser representations/warranties related to "bad actor" disqualifying events are included in the Voting Agreement. But see change to Section 2 below, footnote 19.	
Section 1.5 – Definitions (see footnote 14)	In life sciences transactions, the definition of "Company Intellectual Property" will typically include greater detail regarding patent rights given the heightened importance and emphasis of patent rights in many such deals.	LS
Section 2 – Representations and Warranties (See footnote 19)	A footnote has been added suggesting that in financing transactions where certain Purchasers are not also entering into the Voting Agreement (which includes Purchaser representations/warranties related to "bad actor" disqualifying events), the parties should consider adding "bad actor" representations/warranties to the SPA.	GI/CP
Section 2.5 – Valid Issuance of Shares	Representations/warranties related to "bad actor" disqualifying events have been deleted in light of the fact that company representations/warranties to this effect are included in the Voting Agreement.	GI/CP
2.8 – Intellectual Property	The science upon which many life science companies are based frequently derives from work done in a university, hospital or other research institute setting. In recognition of this, and in order to ensure a clear and proper understanding of the origin of the science and related intellectual property rights, it is advisable to add language to the intellectual property rep whereby the company represents that no academic or medical institution has any claim or ownership rights in the company's underlying intellectual property thereby forcing the company to examine the origin of the intellectual property and disclose any link back to such an institution.	LS
2.8—Intellectual Property	Frequently the development of life science companies has been undertaken with the benefit of government funding which has been provided to either a university, hospital or other research institute. It is important to understand when this is the case in order to ensure that the underlying intellectual property is properly owned by the university or hospital (meaning properly assigned thereto by inventors), and in turn properly licensed to the company from such university or hospital. In recognition of this, and in order to ensure a clear and proper understanding of the origin of the science and related intellectual property rights, it is advisable	LS

	to request that the company represent that no government funding was used in the development of the underlying science, whether directly or indirectly through a university or hospital laboratory or other third party that may be funded by the government. This encourages the company to examine the origin of the intellectual property and confirm that it is properly owned and in-licensed by such university or hospital as the case may be.	
Section 2.8 – Intellectual Property	The scope of the types of intellectual property that must be listed by the company on the Disclosure Schedule has been limited (rather than simply requiring that all "Company Intellectual Property" must be listed) in light of the difficulty scheduling certain categories of intellectual property such as trade secrets.	GI/CP
Section 2.8— Intellectual Property	The intellectual property rep has been modified to include a more detailed and precise assignment of rights provision in order to encourage the company to more closely examine the origin and chain-of-title of its intellectual property.	GI
Section 2.13 – Property and Section 2.16 Employee Matters	Certain knowledge qualifiers have been modified in the representations and warranties: The knowledge-qualification of the representation/warranty as to the company holding a valid leasehold interest in its real property free of any liens, claims or encumbrances has been deleted. The knowledge-qualification of the representation/warranty as to none of the company's employees being restricted by contract or legal order from promoting the company's interests has been bracketed. The knowledge-qualification of the representation/warranty as to neither the company's execution of the financing documents nor the conduct of its business breaching or otherwise constituting a default under an agreement to which an employee of the company is a party has been bracketed. The knowledge-qualification of the representation/warranty as to the company's present intention to terminate any key employee has been removed.	CP
Section 2.29 – Data Privacy	The representations/warranties of the company have been updated to include bracketed language specifically related to	GI

	HIPAA-compliance (applicable to companies that maintain or transmit protected health information).	
Section 2.30 – Export Control Laws	A bracketed set of representations/warranties related to export control law compliance has been added.	GI
Section 2.31— Pre-Clinical Development and Clinical Trials	For life science companies, depending on the company's stage in development, if the company has engaged in clinical trials it is advisable to include a rep that the clinical studies have been conducted in accordance with all applicable procedures and protocols, as well as applicable laws and regulations, and that know notices have been received from the FDA, Institutional Review Board or otherwise indicating that the trial should be stopped or the procedures or protocols should be modified.	LS
Section 2.32—FDA Approvals	For life science companies, depending on the company's stage in development, if FDA approval is required it is advisable to include a rep that the company has all FDA and other applicable approvals necessary to conduct its business, and further that no officer, employee or agent has engaged in any conduct that has caused or could result in disbarment by the FDA.	LS
Section 2.33 – FDA-FDA Regulation	For life science companies, depending on the company's stage in development, if the company is operating under FDA approval it is advisable to include a rep that the company is in compliance with all FDA laws and regulations.	LS
Section 6.2— Successors and Assigns (footnote 67)	In any milestone based transaction, there is the potential for the future right to invest to be "separated" from the stock purchased in earlier closings. This raises potential accounting issues under FASB Accounting Standard Codification ASC 480 risk management which pertains to financial instruments with characteristics of both liability and equity. In order to eliminate this risk the Model Form SPA now includes an alternative "successors and assigns" provision that makes it clear that the ownership of the right/obligation to invest in future rounds may not be separated from the earlier purchased preferred stock.	GI/LS
Section 6.3 – Governing Law	Language has been added clarifying that the parties' choice of governing law is made without the application of conflicts of law principles that would result in the application of any the laws of any state other than that chosen by the parties.	GI

	A substantial section of prior footnote 57 (new footnote 68) has been deleted. This is because it is now generally understood that a Delaware choice of law provision is enforceable.	
Section 6.15 Termination of Closing Obligations.	A new Section 6.15 has been inserted that allows investors to terminate any obligation that they would otherwise have with respect to a future closing if there is some extraordinary, intervening event prior to the closing such as sale of the company, IPO or insolvency. This is an improvement that specifically addresses what should occur in these scenarios.	GI
Section 6.16 – Dispute Resolution (see also footnotes 75-94)	In one of the most significant and potentially impactful modifications to the Model Form SPA (with conforming changes made to the other model forms), a new alternative dispute resolution provision has been added to enable the parties to readily avail themselves of the Delaware Rapid Arbitration Act ("DRAA"). These additions are extensive and include a lengthy set of footnotes that serve as both a useful primer on the DRAA and provide detailed commentary on DRAA as well as various drafting options related to different aspects of the DRAA. Prior footnote 62 has been deleted. This footnote referenced 2009 legislation that permitted the confidential arbitration of certain disputes before a sitting Delaware Chancery Court Chancellor, but cautioned that there was a U.S. District Court decision out of the District of Delaware, *Delaware Coalition for Open Government*, which held that such confidential arbitration was unconstitutional. This footnote was deleted because the statute that was struck down in *Delaware Coalition for Open Government* has been replaced by the DRAA and is no longer relevant.	GI/CP

MODEL FORM CERTIFICATE OF INCORPORATION

Provision	Description of Change	Type
Article IV, Part B Sections 2.1 & 2.2—Preferential Payments to Holders of Series A Preferred Stock; Payments to Holders of Common Stok	Changes to these sections are intended to clarify the distinction between a distribution on liquidation, dissolution or winding up of the company outside of the context of a Deemed Liquidation Event (in which case distributions are made out of available assets) and in the context of a Deemed Liquidation Event (in which case the distributions are made out of the consideration payable to the stockholders in such Deemed Liquidation Event or out of Available Proceeds). No substantive change is intended.	GI
Section 2.3.1—Deemed Liquidation Events; Definition (footnote 21)	A new defined term "Requisite Holders" has been inserted to simplify drafting in various places in the Certificate of Incorporation that reference voting thresholds. Footnote 21 highlights the possibility that the business of the company could be sold separately from certain assets, such as the intellectual property, and depending on the value of the residual property such a transaction might not trigger liquidation preference rights. The footnote includes a drafting option to address this scenario.	GI GI
Section 2.3.2 — Effecting a Deemed Liquidation Event	These changes are intended for clarification only and are not intended to result in any substantive change to the liquidation preference rights provisions.	GI
Section 2.3.3—Amount Deemed Paid or Distributed (footnote 23)	A bracketed drafting option has been added to the end of Section 2.3.3 that would allow the Series A Director or Directors approval rights with respect to the valuation of property paid or distributed in connection with a Deemed Liquidation Event. Extensive changes have been made to prior footnote 22 (new footnote 23), which provides a detailed drafting alternative the purpose of which is to establish a specific set of rules with respect to the valuation of securities including those publicly traded. The changes are primarily designed to more clearly define "trading day" and "closing prices" as used in this alternative provision, and to conform the alternative provision to changes made in the main provision.	GI/CP GI

Section 3.2 — Election of Directors (see footnotes 26-28)	Footnotes 26 through 28 highlight important DGCL requirements that are necessary to comply with in order to: (i) have a proper quorum of the Board of Directors; and (ii) properly elect, remove and replace directors.	GI
Section 3.3.5— Series A Preferred Stock Protective Provisions	A new protective provision has been added to provide the Requisite Holders a veto over token, crypto-currency and blockchain related offerings.	CP
Section 3.3.7— Series A Preferred Stock Protective Provisions	Additions are intended to clarify that the intent is to cover indebtedness for borrowed money, as well as associated encumbrances such as liens and security interests.	AA/GI
Section 3.3.8— Series A Preferred Stock Protective Provisions	Additions are intended to clarify that the actions encompassed by the protective provisions also apply to subsidiaries of the Company.	AA/GI
Section 4.8— Adjustment for Merger or Reorganization, etc. (footnote 56)	The last sentence of this Section 4.8, which previously was a drafting option, has been struck because of the lessons of *Metromedia,* which suggest that convertible preferred stock faces significant risk of being valued on an as-converted basis in an appraisal proceeding unless the shares are clearly entitled, under a specific provision of the charter, to payment of a different amount (such as liquidation preference) in the merger in question. See also Matter of Appraisal of Ford Holdings, 698 A.2d 973 (Del. Ch. 1997). Changes in footnote 56 simply elaborate on and clarify the implications of the *Metromedia* case and its application.	GI
Section 5A. Special Mandatory Conversion (see footnote 60)	In life science transactions, when there is a mandatory conversion play-or-pay feature, the ratio upon which the breaching investors' preferred stock converts to common stock may be on a punitive, reverse stock split basis. Footnote 60 highlights the need to modify this section in those circumstances.	LS
Section 5.1 – Mandatory Conversion;	Language has been added providing that in a public offering of the Company's capital stock resulting in a mandatory conversion of the Series A Preferred, the	GI/CP

Trigger Events	public offering must result in the listing of the Company capital stock on one of the prescribed stock exchanges unless approved by the Series A Director.	
Section 6.4 – Redemption (see footnote 75)	A new Section 6.4 has been added that would provide for the accrual of a high rate of interest on the Redemption Price payable with respect to shares of stock that are subject to a redemption request that has been unfulfilled by the company. The proposed language has been added in light of the ruling of the Delaware Court of Chancery in its *Trading Screen* and *Thoughtworks* decisions, as well as the more recent *ODN Holding Corporations* case, as an economic inducement to the Company to timely fulfill investor redemption requests.	CP
Article SIXTH	The modification incorporates into the Certificate of Incorporation the same Board of Director level protective provisions that the investors have negotiated for in the Investor Rights Agreement and should be consistent with that agreement.	GI/CP
Article TENTH	Language has been added stating that any amendment to the Certificate of Incorporation shall not increase the liability of a director with respect to any acts/omissions of such director occurring prior to such amendment.	CP/GI
Article ELEVENTH	Language has been added stating that any amendment or repeal of Article ELVENTH shall only be prospective in its effect and that any amendment or repeal of Article ELEVENTH, or the adoption of a provision inconsistent therewith, shall require the affirmative vote of the holders of a prescribed percentage of Series A preferred stock.	GI

MODEL FORM RIGHT OF FIRST REFUSAL AND CO-SALE AGREEMENT

Provision	Description of Change	Type
Section 1.6 – Definitions	The defined term "Company Notice" has been updated to require the company to notify the Investors (as well as the selling Key Holder) of its intention to exercise its Right of First Refusal.	GI
Section 2.1(b) – Right of First Refusal	The procedures related to the company's exercise of its Right of First Refusal have been updated to require the company to (i) notify the Investors (as well as the selling Key Holder) of its intention to exercise its Right of First Refusal, and (ii) to include the number of shares of stock that the company intends to purchase.	GI
Section 2.2(d) – Right of Co-Sale	Language has been added clarifying that, in cases where a Proposed Key Holder Transfer constitutes a Deemed Liquidation Event under the Certificate of Incorporation and a portion of the consideration received in connection with purchase and sale of the Key Holder's Transfer Stock is payable only upon satisfaction of certain contingencies, then the portion of the consideration not subject to such contingencies shall be distributed in accordance with the waterfall provisions of the Restated Certificate as if it was the only consideration received in connection with the Proposed Key Holder Transfer. The prior version of this Section 2.2(d) only specifically addressed amounts placed in escrow, not other forms of contingent consideration. This change aligns the Model Form Right of First Refusal Agreement more closely with Article IV(B), Section 2.3.4 of the Model Form Certificate of Incorporation.	GI
Section 6.4 – Dispute Resolution (footnotes 16-35)	In one of the most significant and potentially impactful modifications to the Model Form Right of Frist Refusal Agreement (with conforming changes made to the other model forms), a new alternative dispute resolution provision has been added to enable the parties to readily avail themselves of the DRAA. These additions are extensive and include a lengthy set of footnotes that serve as both a useful primer on the DRAA and provide detailed commentary on the DRAA as well as various drafting options related to different aspects of the DRAA. Prior footnote 15 has been deleted. This footnote	GI

	referenced 2009 legislation which permitted the confidential arbitration of certain disputes before a sitting Delaware Chancery Court Chancellor, but cautioned that there was a U.S. District Court decision out of the District of Delaware, *Delaware Coalition for Open Government*, which held that such confidential arbitration was unconstitutional. This footnote was deleted because the statute that was struck down in *Delaware Coalition for Open Government* has been replaced by the DRAA and is no longer relevant.	
Section 6.5 – Notices	Language has been added whereby the parties consent to the delivery of any statutorily required notice by means of electronic transmission.	GI/CP
Section 6.8 – Amendment; Waiver and Termination	Language has been added prohibiting the amendment, termination or modification of the agreement or the waiver of a section thereof without the consent of an Investor if such action would adversely impact such Investor in a manner disproportionate to the impact upon the other Investors.	GI
Section 6.12 – Governing Law	Language has been added clarifying that the parties' choice of governing law is made without the application of conflicts of law principles that would result in the application of the laws of any state other than that chosen by the parties. In addition, a substantial section of prior footnote 19 (new footnote 39) has been deleted. This footnote was deleted because it is now generally understood that a Delaware choice of law provision is enforceable.	GI

MODEL FORM VOTING AGREEMENT

Provision	Description of Change	Type
Section 1.1—Size of Board	A parenthetical has been added clarifying that the preferred stock vote required to be taken is to be tabulated on an as-converted to common stock basis. While preferred stock typically converts 1:1 at the outset, if there has been a change in the conversion rate due to an anti-dilution adjustment, this can change the composition of the preferred stockholders needed for this approval.	GI
Section 1.2—Board Composition	While there are a number of changes to this section, they are largely stylistic.	GI
Section 1.4—Removal of Board Members (footnotes 9 and 12)	Footnotes 9 and 12 highlight the importance of properly following the formalities for resignation and removal of directors both in accordance with the Model Form Voting Agreement and the DGCL.	GI
Section 3.2 – Drag Along Right; Actions to be Taken (footnote 15)	An alternative to the standard drag along voting provision requiring the holders of a majority of the then outstanding common stock to vote in favor of a Sale of the Company has been added as a footnote. Under the alternative approach, the vote of a majority of the common stock held by Key Holders then providing services to the Company would be required. This alternative approach is similar to the alternative drafting option that has been in Section 1.2(c) (Board Composition) of the Voting Agreement and is intended to prevent common stockholders who are no longer actively involved in the company from interfering with a drag along.	GI/CP
(footnote 16)	Footnote 16 has been added underscoring the importance of including an express waiver of appraisal rights by the stockholders in light of the ruling of the Delaware Court of Chancery in its *Riverstone National* decision. The footnote goes on to point out that the court did not specifically rule on the efficacy of waiving such statutory rights in advance in the *Riverstone National* decision yet also indicates that including such a waiver in the Voting Agreement suggests that the parties have agreed to such a waiver notwithstanding whether the drag-along is ever implemented in connection with a Sale of the Company.	GI/CP
(footnote 17)	Bracketed language has been added that would prohibit a	GI/CP

	stockholder from asserting a claim or commencing a suit that (i) challenges a Sale of the Company or the Voting Agreement or (ii) alleges a breach of fiduciary duty of a Selling Investor or any affiliate thereof in connection with a Sale of the Company. This language is intended to address the increasing prevalence of breach of fiduciary claims by common or junior preferred stockholders seeking quasi-appraisal in connection with corporate transactions subject to drag-along provisions. The NVCA model form drafting committee had lengthy discussions about these provisions-- particularly the advanced waiver of the right to bring a fiduciary duty claim. From an investor's perspective, stockholders who have agreed to a drag along should not be able to later challenge the transaction including based on a claim for breach of fiduciary duty. From the perspective of the common stockholders and junior preferred, their willingness to agree to the drag might be predicated on the assumption that the board of directors and controlling stockholders will be fully subject to all applicable fiduciary duties. Exceptions for bad faith and gross negligence have been added to the stockholder covenant to not assert claims against the stockholder Representative in connection with a Sale of the Company.	GI
Section 3.3 – Drag Along Right; Conditions	A number of modifications have been made to Section 3.3, which recites the conditions that must be satisfied in order for a stockholder to be bound to the drag along. While there are some additional conditions that have been added, the main purpose of most of the modifications is to build sufficient flexibility into the drag along conditions so that technicalities in the drag conditions do not render the drag useless in practice. The changes to the drag conditions include the following: Bracketed language has been added that provides that no stockholder can be required to comply with the drag provision if the stockholder would be required to agree to a restrictive covenant (e.g. non-compete, non-solicit) in connection with a Sale of the Company. Bracketed language has been added that provides that no stockholder can be required to agree to amend, extend or terminate a contract with the company (except for a termination of investor-related documents with the	GI/CP

	company) in connection with a Sale of the Company. Previous language that required a stockholder's liability for indemnification for breaches of representations/warranties of the company or the stockholders in connection with a Sale of the Company to be several and not joint has been deleted. In previous language, a stockholder was not to be held liable for the breach of any representation, warranty or covenant by any Person other than the company "except out of an escrow that had been established to cover breaches of representations, warranties or covenants of the company as well as breach by any stockholder of identical representations, warranties or covenants provided by all stockholders". This condition has been bracketed. Prior language included a condition that a stockholder could be liable only for its "pro rata" share of proceeds. This condition has been deleted. Prior footnote 14, which cross referenced Section 2.3.4 of the Model Form Certificate of Incorporation and was an exception to the previously deleted pro rata requirement, has been deleted. In situations where certain holders of capital stock are given the option to decide the form of consideration that they receive in connection with a Sale of the Company, bracketed language has been added that would require all holders of capital stock to be given the same option. Previous language allowed the holders of a designated percentage of preferred stock to alter the allocation of consideration payable to stockholders in connection with a Sale of the Company from the allocation required in the Certificate of Incorporation. This language has been deleted and new language has been inserted that allows for a reallocation to occur only if stockholders holding the requisite number of shares of capital stock waive their right to a distribution of proceeds in accordance with the waiver provisions set forth in the Certificate of Incorporation. This simply clarifies that the liquidation preference rights may only be waived in accordance with the Certificate of Incorporation.	

Section 4.2—Irrevocable Proxy and Power of Attorney (footnote 21)	A sentence has been added that clarifies by whom and when the power of attorney may be executed. New language has been added to footnote 21 citing the *Riverstone* case and reinforcing the importance of exercising the proxy vote at the time of the approval of the transaction, not afterwards.	GI GI
Section 4.3—Specific Performance	Prior footnote 20, which suggested specific performance as the preferred remedy in the case of a Voting Agreement, has been deleted because of the 2010 *Fletcher* case that awarded damages, rather than specific performance, for breach of a charter protective provision.	GI
Section 5 – Bad Actor Matters	The "bad actor" provisions have been taken out of the Model Form Stock Purchase Agreement and consolidated in a substantially modified Section 5 of the Model Form Voting Agreement in order to ensure that all investors and stockholders who are signing the financing documents are subject to the bad actor provisions. Additional modifications have been made to reflect best practices that have emerged since the "bad actor" rules were enacted.	GI/CP
Section 5.1—Bad Actor Matters; Definitions	"Company Covered Person", "Disqualified Designee", "Disqualification Event" and "Rule 506(d) Related Party" have been added as newly defined terms in light of the addition of new "bad actor" representations to the Voting Agreement.	GI/CP
Section 5.2 – Bad Actor Matters; Representations	The existing Investor representations with respect to Disqualification Events have been modified to state that each Investor has exercised reasonable care in determining whether a Disqualification Event is applicable to any individual designated to the Board of Directors by such Investor. An exception to the existing representations has been added with respect to individuals who may be deemed to be a beneficial owner of the company's equity securities in certain situations. A company representation has been added whereby the company represents to the Investors that no Disqualification Event is applicable to the company or, to its knowledge, applicable to any Company Covered	GI/CP GI/CP

	Person.	
Section 5.3 – Bad Actor Matters; Covenants	The covenant with respect to the non-designation of certain individuals to the Board of Directors has been expanded to (i) prohibit the designation of any individual who is known by the designating Investor to be a Disqualified Designee, (ii) require an Investor to use reasonable care in determining whether a director designated by such Investor is a Disqualified Designee and (iii) require an Investor that becomes aware that he/she/it has designated a Disqualified Designee to the Board of Directors to take action to remove such individual from the Board of Directors.	GI/CP
Section 7.4 – Governing Law	Language has been added clarifying that the parties' choice of governing law is made without the application of conflicts of law principles that would result in the application of the laws of any state other than that chosen by the parties. In addition, a substantial section of prior footnote 27 (new footnote 28) has been deleted. This footnote was deleted because it is now generally understood that a Delaware choice of law provision is enforceable.	GI
Section 7.7 – Notices	Language has been added whereby the parties consent to the delivery of any statutorily required notice by means of electronic transmission.	GI/CP
Section 7.8 – Consent Required to Amend, Modify, Terminate or Waive	The section has been updated to (i) conform with changes to Section 1.2; (ii) cover not only amendments and terminations of the agreement or waivers of the parties' rights thereunder but also modification of the agreement; and (iii) to ensure that the amendment provision itself (Section 7.8) cannot be modified as a first step in order to allow for rights that would otherwise require the consent of certain stockholders to be modified without their consent.	GI/AA
Section 7.16 – Dispute Resolution (footnotes 32-51)	In one of the most significant and potentially impactful modifications to the Model Form Voting Agreement (with conforming changes made to the other model forms), a new alternative dispute resolution provision has been added to enable the parties to readily avail themselves of the DRAA. These additions are extensive and include a lengthy set of footnotes that serve as both a	GI

	useful primer on the DRAA and provide detailed commentary on the DRAA as well as various drafting options related to different aspects of the DRAA. Prior footnote 30 was deleted. This footnote referenced 2009 legislation that permitted the confidential arbitration of certain disputes before a sitting Delaware Chancery Court Chancellor, but cautioned that there was a U.S. District Court decision out of the District of Delaware, *Delaware Coalition for Open Government*, which held that such confidential arbitration was unconstitutional. This footnote was deleted because the statute that was struck down in *Delaware Coalition for Open Government* has been replaced by the DRAA and is no longer relevant.	
Addendum to Voting Agreement: Sample Sale Rights	A footnote has been expanded clarifying that the addendum is intended to address the rulings of the Delaware Court of Chancery in its *Trading Screen* and *Thoughtworks* decisions.	GI

INVESTOR RIGHTS AGREEMENT

Provision	**Description of Change**	**Type**
Section 1.32 – Definitions	The definition of "Series A Director" has been updated to clarify that it refers to a director elected solely and exclusively by the holders of Series A preferred stock as a separate class.	GI
Section 2.13— Registration Rights; Termination of Registration Rights	Under the prior form, the registration rights terminated once restricted securities could be sold pursuant to Rule 144. This has been modified so that termination following availability of Rule 144 only applies after an IPO. The prior footnote 30, which explained reasons why reliance on Rule 144 has its limitations, has been deleted given that the Rule 144 termination trigger now only applies post-IPO.	CP CP
Section 2.10 – Limitations on Subsequent Registration Rights	Previously bracketed language suggested that the vote of a majority of the holders of Registrable Securities was required to approve the granting of "senior" registration rights to investors. This bracketed language has been updated to require the vote of the holders of a to-be-determined, specified percentage of Registrable Securities.	GI
Section 3.1 – Information and Observer Rights; Delivery of Financial Statements	Bracketed language has been added providing for Series A Director approval of the next year financial budget/business plan of the company as a drafting option.	GI
Section 5.1 – Additional Covenants; Insurance	Previously, the covenant requiring the company to obtain D&O insurance coverage within 90 days of the date of the IRA was qualified as to the Company's "commercially reasonable efforts". The qualification has been deleted so it is an unqualified obligation to obtain insurance. The proposed amount of the insurance policy has been increased from $2,000,000 to $3,000,000.	GI/CP
Section 5.3 – Additional Covenants; Employee Stock	Language has been added that prohibits, without the approval of the Board of Directors, the amendment or modification of the vesting provisions of any equity agreements with employees or service providers if such	GI

	changes would otherwise be inconsistent with the vesting guidelines set forth in Section 5.3.	
Section 5.9 – Additional Covenants; Indemnification Matters	Language has been added clarifying that the Investor Directors and the Investor Indemnitors are intended third-party beneficiaries of the priority of indemnification obligation language in this section (and that such parties have the authority to directly enforce such language).	GI
Section 5.11— Additional Covenants; Harassment Policy	A covenant has been added that requires the Company to adopt and thereafter maintain a Code of Conduct governing appropriate workplace behavior and an Anti-Harassment and Discrimination Policy prohibiting discrimination and harassment at the company.	CP
Section 6.2 – Miscellaneous; Governing Law	Language has been added clarifying that the parties' choice of governing law is made without the application of conflicts of law principles that would result in the application of the laws of any state other than that chosen by the parties.	GI
Section 6.5 – Miscellaneous; Notices	Language has been added whereby the parties consent to the delivery of any statutorily required notice by means of electronic transmission.	GI/CP
Section 6.6 – Miscellaneous; Amendments and Waivers	Language has been added expanding the scope of this section to include (i) "modifications" and "termination" of the Investor Rights Agreement (rather than just amendments and waivers), and (ii) to ensure that the amendment provision itself (Section 6.6) cannot be modified as a first step in order to modify other provisions that would otherwise require the consent of certain stockholders. Language has been added that requires the affirmative vote of the holders of at least a majority of the Registrable Securities held by the Major Investors to amend, modify, terminate or waive any Major Investor-specific rights in the Investor Rights Agreement. Notwithstanding the stockholder consent requirements for certain amendments, modification or waivers of the Investor Rights Agreement, an exception from such consent requirements has been added for certain updates	GI/AA GI GI

	to Schedule A to the Investor Rights Agreement.	
Section 6.11 – Miscellaneous; Dispute Resolution (footnotes 61-80)	In one of the most significant and potentially impactful modifications to the Model Form Investor Rights Agreement (with conforming changes made to the other model forms), a new alternative dispute resolution provision has been added to enable the parties to readily avail themselves of the DRAA. These additions are extensive and include a lengthy set of footnotes that serve as both a useful primer on the DRAA and provide detailed commentary on the DRAA as well as various drafting options related to different aspects of the DRAA. Prior footnote 60 has been deleted. This footnote referenced 2009 legislation that permitted the confidential arbitration of certain disputes before a sitting Delaware Chancery Court Chancellor, but cautioned that there was a U.S. District Court decision out of the District of Delaware, *Delaware Coalition for Open Government*, which held that such confidential arbitration was unconstitutional. This footnote was deleted because the statute that was struck down in *Delaware Coalition for Open Government* has been replaced by the DRAA and is no longer relevant.	GI/CP
Section 6.13 – Miscellaneous; Acknowledgement	Language acknowledging that the Investors are in the business of venture capital investing and that nothing in the agreement would preclude the investors from investing in other companies (even if such companies are competitors of the Company) has been deleted in light of the language addressing these matters in Section 5.10.	GI